

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1376

ADOPTION OF BEATRICE
(and two companion cases¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a trial in the Juvenile Court, a judge found the mother and the father unfit to parent the children, and terminated their parental rights. A posttermination and postadoption visitation order allowed the parents "at least one visit per year" with the children. On appeal the mother contends that there was insufficient evidence to support a finding of her unfitness and that termination was not in the children's best interests. The father also appeals, arguing the lack of evidence as to his unfitness, and that the judge prematurely terminated his parental rights. Both parents claim that it was error for the judge to order only one posttermination and postadoption visit per year with the children, and to grant the Department of Children and Families

¹ Adoption of Adam; Adoption of Edward. The children's names are pseudonyms.

(department) and the adoptive parents the discretion to determine whether the annual visit is in the best interests of the children. After careful consideration of the record and the judge's findings, we affirm the decrees.

Background. The department first became involved with this family in January 2010.² The mother and the oldest child, Beatrice, both tested positive for methadone at the child's birth; Beatrice remained in the hospital for some time receiving treatment for methadone withdrawal. Beatrice was later discharged from the hospital into the parents' care. In October 2010, the father reported to the department that the mother had relapsed and was again using crack cocaine, marijuana, and alcohol; she was newly pregnant with their second child. In April 2011, when the parents' second child, Adam, was born, neither the mother nor the child tested positive for any substances. In July 2012, the parents' third child, Edward, was born; both he and the mother tested positive for marijuana. The family's case remained open to address the parents' ongoing drug use and unaddressed mental health issues, and concerns with the children's hygiene and the conditions in the family home.³

² The mother has a history with the department dating back to 2000, involving two older children from previous relationships. Those children are not involved in these proceedings.

³ The parents got married in May 2013.

On August 13, 2013, a mandated reporter filed a G. L. c. 119, § 51A, report (§ 51A report) against the mother and the father over concerns for the children's cleanliness; Edward's extensive diaper rash led to a staph infection that required his hospitalization due to brain swelling. All three children had scabies. During the pendency of this case, each parent had separately reported to the department incidents of domestic violence in their relationship; on a number of occasions the police responded to domestic calls at the family home while the children were present. In August 2013, the father obtained a G. L. c. 209A restraining order against the mother, which was effective for six months. After only a few days, the mother moved back into the house with the father and the children, and the father had the order vacated the following week.⁴ In January 2015 another § 51A report was filed after the police responded to the parents' house to find the mother "out of it" while the children and the father were home.

In February 2015, the police responded to a call at the Noble Hospital where they found the mother outside, yelling; she reported to the police that she had fled in fear from her house because a man came to her door with blood on his shirt. The police and the department went to the family's house and found

⁴ Before the restraining order was vacated, the mother violated the order and was jailed overnight.

the father present; he had helped one of the children with a skinned knee and had blood on his shirt. While there, the department noted that both parents appeared "high"; the house was "disgusting and it smelled"; it was difficult to walk anywhere in the house due to the clutter of clothes, debris, and pets; and the children were asleep in their bedrooms, the doors to which had locks "high up on the outside of the door." During the follow-up visit the next day, the department noted that the house was filthy, as were the children, and drugs were found in the house. The children were removed from the parents' care and taken to the hospital for examination.

After the seventy-two hour hearing held on February 11, 2015, the children were returned to the parents with an order of conditions. Subsequently, in April 2015 the father was given sole temporary custody of all three children; as conditions of custody, the father was ordered to live separately from the mother (at the home of the paternal grandparents).⁵ The mother was allowed only supervised contact with the children. The father did not seek from the department or the court an order

⁵ After being fired from his teaching position in 2013, the father could no longer pay the mortgage or the utility bills; by April 2015 the utilities in the family home had been shut off due to nonpayment, and the house went into foreclosure.

requiring the mother to leave the family home so that he could return there with the children.

On October 21, 2015, police officers discovered that the father had been living with the mother at the family home in violation of the April 2015 court order and reported this to the department. The next day, the parents drove with the children to South Carolina;⁶ the father testified that it was originally the mother's idea to travel to South Carolina, but that he also thought it was a good idea. They did not inform the court, the department, or the children's school that they were leaving Massachusetts with the children. On October 28, 2015, the parents were arrested in South Carolina; the mother had heroin in her possession at the time of her arrest. The children were placed in the same Massachusetts foster home they had stayed in when removed from the parents in February 2015. In May 2016 the department's goal for the children was changed to adoption by the foster family.⁷

After removal, supervised weekly visits with the children was the one consistent service plan task with which the mother

⁶ During their drive from Massachusetts to South Carolina, the family stopped at three or four hospitals in an attempt to obtain methadone for the mother.

⁷ In June 2016 the mother gave birth to John (a pseudonym), who tested positive for methadone and remained in the hospital for treatment of withdrawal symptoms. John was not named in the underlying petition nor is he involved in the instant appeal.

and father complied; however, the visits were unstructured and often chaotic. The children experienced meltdowns during visits which required intervention by the supervising staff; the parents continuously brought to the visits unhealthy, sugary snacks and had conversations with the children that were inappropriate. When the father attended visits without the mother he was appropriate and the visits went well, although he admittedly had difficulty managing all the children together; as a result, he later asked to have his visits scheduled at the same time as the mother.

During the pendency of this case, the department's primary concerns continued to be with the mother's struggle to maintain her sobriety, her unaddressed mental health issues, the deplorable conditions of the family home, the father's marijuana dependency, and his continued acquiescence to, and inability to separate from, the mother. The father was unable to positively influence the mother's behavior when they were together, and sometimes participated in the chaotic environment created by the mother's volatile and erratic behavior.

Beatrice was diagnosed with autism and attention deficit and hyperactivity disorder (ADHD). She attended the May Institute until age three, then attended the Peppermill School; she also received supportive services at the foster home through the Autism Waiver Program (AWP), which services utilized

prescribed interventions of behavior. Beatrice lived with the mother and father when she first started to attend the Peppermill School; at that time she was not toilet trained, she screamed, flopped on the floor, and hit the other children. In addition, she often came to school dirty and with ill-fitting clothes, with food on her face, and with dirty diapers. After her placement with the foster family, Beatrice participated in the school's toilet training program, which the mother and father previously declined. By June 2016, Beatrice was totally toilet trained, her aggression toward others was completely gone, she spoke in full sentences, she made eye contact, and she had progressed socially.

Adam also was diagnosed with autism and ADHD and required medication to regulate his behavior; he also received AWP services, and had an individualized education program in school. Adam was described as very intelligent and a good communicator. Since living with the foster family he attended an autistic clinic program and learned to not automatically reply "no" when asked to do something. He also worked on his organizational skills after living in the foster home, became toilet trained, and learned to retrieve things from his backpack on his own.

Edward suffered from posttraumatic stress disorder and was considered "a special needs child." He attended weekly therapy

and also received AWP services using behavioral strategies and visual aids.

The children have made "exceptional gains" personally, socially, and academically since living with the foster family. At the time of trial, the children had formed a nurturing bond with the foster parents after more than two years in their care, and identified them as "mom and dad."

The mother has a long history of substance abuse dating back to 2000. She has unsuccessfully attended several in-patient and out-patient drug treatment programs, and has attempted to wean herself from drugs using methadone. The mother also has a violent criminal record and has been the subject of a number of abuse prevention orders issued pursuant to G. L. c. 209A on complaints filed by the father and the mother's former husband. As part of her service plans in this case the mother was required to, among other things, maintain her sobriety by engaging in a long-term drug treatment program, participate in individual counseling, complete a parenting class and parenting evaluation, sign releases for service provider information including drug screen results, maintain a clean home, cooperate with the department, and attend visitation with the children (to which she was asked to bring nutritious snacks). At the foster care review just prior to trial, the

mother was found noncompliant, as she failed to follow through or complete many of her assigned tasks.⁸

The father admitted to daily marijuana use as the sole treatment for his diagnosed anxiety and depression. In May 2013 the father was suspended from his public school teaching position due to assault charges against him for hitting a woman with a baseball bat in front of his house; he was later terminated from his job for "questionable behavior," and did not return to teaching. In April 2015, when the father had temporary sole custody of the children, he left them with the current foster parents for one week while the paternal grandparents went away on vacation, as they did not want the father alone at their house with the children. The father admittedly had difficulty caring for the children on his own for an extended period of time. Although in April 2015 the father contemplated divorcing the mother, in October 2015 he reunited

⁸ The mother requested that the social worker assigned to the family be replaced several times; she did not allow department personnel into the house; she could not refrain consistently from drug use; she continuously signed, then revoked, releases for service providers; she started but did not complete drug treatment programs; she admitted to using heroin and cocaine during her pregnancy with John, her youngest child, while this case was pending; she continuously brought unhealthy, sugary snacks to visits with the children, telling supervising staff members that "they are my children -- I can feed them how I want"; and she did not utilize strategies during visits with the children that had been outlined by the AWP, stating instead, "you're not going to tell me how to run my one-hour visit."

with her in the family home, in violation of the April 2015 court order.⁹ A short time later he fled with the mother and the children to South Carolina.

In the summer of 2017, while the father lived in his car, he requested custody of the children so he could obtain housing. Although the father and mother separated several times during the pendency of this case, the father inevitably returned to his relationship with the mother. He reconciled with the mother in the summer of 2017, only a few months before trial. The father's visits alone with the children were appropriate, but the judge found that his relationship with the mother "appears to take precedence" over his relationship with the children.

After five days of trial, the judge determined that both the mother and the father were unfit to care for the children, and that termination of their parental rights was in the best interests of the children.¹⁰ The judge ordered one visit per

⁹ While the father had sole custody of the children, the mother made allegations to the department that the father had sexually assaulted Beatrice and had physically abused all the children. After investigation, the allegations were not supported. The mother also reported that the father was a hoarder and the cause of the deplorable conditions in the family home.

¹⁰ At the outset of trial, the judge commented that "this is scheduled for a five-day trial. I do want to tell you that, if we're not finished on Friday, that I will call a mistrial. I don't have any more time to give to the case than what I've got right now and you'll have to start over again. So just keep that in mind." Although we understand the importance of case management in the trial court, these comments by the judge were

year between the mother, the father, and the children, if the department or the adoptive parents determined the visits were in the children's best interests. The judge also ordered "liberal" visits each year between the children and John, their younger brother. See note 7, supra. The mother and the father timely appealed.

Discussion. "To terminate parental rights to a child and to dispense with parental consent to adoption, a judge must find by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence, that the parent is unfit to care for the child and that termination is in the child's best interests." Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "In determining whether the best interests of the children will be served by issuing a decree dispensing with the need for consent, a 'court shall consider the ability, capacity, fitness and readiness of the child[ren]'s parents . . . and shall also consider the plan proposed by the department or other agency initiating the petition.'" Adoption of Nancy, 443 Mass. 512, 515 (2005). See G. L. c. 210, § 3 (c). "The question for the judge is whether the parent's deficiencies place the child[ren] at serious risk of peril from abuse,

insensitive at best. In the future, it would be better to instruct counsel more tactfully as to the anticipated trial schedule, especially in light of the important rights of the parties at stake in these types of cases.

neglect, or other activity harmful to the child[ren]" (quotation omitted). Adoption of Lisette, 93 Mass. App. Ct. 284, 285 n.2 (2018).

In addition, "[t]he judge is free to rely on a parent's 'prior patterns of neglect and misconduct in determining [the parent's] current unfitness,' . . . and may also take into account the child[ren]'s condition while with [the parent] as contrasted with [the children's] development after removal from [the parent's] care." Adoption of Terrence, 57 Mass. App. Ct. 832, 835 (2003), quoting Adoption of Mario, 43 Mass. App. Ct. 767, 773 (1997). "Where there is evidence that a parent's unfitness is not temporary, the judge may properly determine that the child[ren]'s welfare would be best served by ending all legal relations between parent and child[ren]." Adoption of Cadence, 81 Mass. App. Ct. 162, 169 (2012). "Unless shown to be clearly erroneous, we do not disturb the judge's findings, which are entitled to substantial deference." Adoption of Jacques, 82 Mass. App. Ct. at 606-607.

1. The mother. The mother argues that the judge's findings were insufficient to show by clear and convincing evidence that she was unfit to parent the children and that it was in their best interests to terminate her parental rights. She claims that to support the unfitness finding the judge impermissibly relied on the substantive content of § 51A reports

admitted merely to "set the stage," and on opinion statements and hearsay contained in other department records. She contends that the judge also failed to provide a nexus between her past substance abuse and her ability to provide minimal care for the children.

Evidence in the record amply supported the judge's findings of fact in determining the mother's parental unfitness. See Adoption of Terrence, 57 Mass. App. Ct. at 835. In addition to considering the long-standing pattern of neglect by the mother affecting each of the children, the judge also thoroughly considered the mother's ongoing substance abuse issues, her emotional and mental instability, the children's exposure to domestic violence, her inability to attend to the children's hygiene (which affected their health and well-being), her past patterns of misconduct, her failure to engage in remedial services, and her criminal activity. Based on this record, "the judge did not clearly err in finding that the mother was unfit and that her unfitness was not temporary." Adoption of Ilona, 459 Mass. 53, 62 (2011). The children need a safe and predictable environment, which the mother has been unable to provide.

Although the mother initially obtained the children's autism diagnoses and sought early intervention services, she did not follow up after they aged out of those services, resulting

in the children's failure to thrive. She is in no better position now to care for the children than when the children were removed in February 2015, due to her inconsistent utilization, or outright refusal, of services provided by the department. By contrast, the children have thrived in the care of the foster parents, who sought and secured appropriate services for each of the children (who have varying special needs), and consistently utilized the suggested strategies employed by the professionals working with the children.

Similarly, the extensive findings issued by the judge demonstrated close attention was given to the evidence, and to the fourteen factors outlined in G. L. c. 210, § 3 (c), in determining that the termination of the mother's parental rights was in the best interests of the children. Adoption of Nancy, 443 Mass. at 514-515. The record reveals that the judge considered all the evidence and not, as the mother contends, merely the § 51A reports, in determining that the mother's "grievous shortcomings" justified a termination of her parental rights. See Adoption of Cadence, 81 Mass. App. Ct. at 168, quoting Adoption of Katharine, 42 Mass. App. Ct. 25, 28 (1997).

In addition to the documented failings and consistent service plan noncompliance by the mother while the children were in her care, the mother's deficiencies continued after the children were removed from her custody. In fact, her inability

to assume the duties and responsibilities of parenting were exemplified during the supervised visits she attended. In the year leading up to trial, the mother's supervised visits were chaotic, the children experienced meltdowns and displayed aggressive behavior, and she was unable to maintain control of all the children together. She continuously brought unhealthy, sugary snacks causing the children to have stomach aches or to become hyperactive by the end of the visit.

The repeated incidents of domestic violence in the children's presence have been harmful to their well-being. See Custody of Vaughn, 422 Mass. 590, 595 (1996) ("a child who has been either the victim or the spectator of [domestic violence] suffers a distinctly grievous kind of harm"). Additionally, the mother's consistent pattern of abusing drugs and failing to engage in services to help her maintain her sobriety has been detrimental to the children. The mother does not deny that she has an issue with substance abuse. However, as the judge found, the mother's inability to maintain her sobriety and continued relapses have left her unable to meet the basic obligations of parenthood, especially in light of the heightened impact on the children, who have special needs. Her substance abuse was a factor in the mother's sometimes volatile and erratic behavior that created chaos and turmoil in the family's home, while the children required structure, routine, and stability. As such,

the judge properly considered the violence to which the children were exposed, as well as the mother's ongoing struggle with substance abuse, as factors in determining that termination of her parental rights was in the children's best interests. See Adoption of Helen, 429 Mass. 856, 860 (1999) ("unsuccessful attempts to address" substance abuse issues properly considered in termination proceedings); Adoption of Saul, 60 Mass. App. Ct. 546, 554 n.11 (2004) (mental illness is relevant to fitness inquiry "once a nexus has been established between the illness and diminished parenting ability").

Based on the foregoing, there was clear and convincing evidence to support the finding of the mother's unfitness, and the children's best interests are best served by the termination of her parental rights. See Adoption of Ilona, 459 Mass. at 59.

2. The father. The father likewise claims a lack of evidence to support a finding of his unfitness to parent the children; he argues that in making her findings the judge adopted witness statements without making credibility determinations, improperly relied on § 51A reports for primary facts, and failed to make individualized findings regarding his ability to parent the children either together or individually. Additionally, he contends that there was insufficient evidence that his alleged parenting shortcomings were not temporary. We do not agree.

First, the findings were amply specific and detailed to support a finding of unfitness as to the father, and the findings he challenges were amply supported by the record, warranting termination of his parental rights. "In deciding whether termination of parental rights will serve the child's best interests, '[t]he inquiry . . . is not whether the parent is a good one, let alone an ideal one; rather, the inquiry is whether the parent is so bad as to place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child.'" Adoption of Cadence, 81 Mass. App. Ct. at 168, quoting Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998).

The judge's findings of fact recount the father's daily marijuana use despite completing a drug treatment program; the father's violent criminal conduct, including domestic violence involving the mother, which led to him being the subject of a c. 209A restraining order obtained by her; the ongoing tumultuous and abusive relationship with the mother in the presence of the children; the father's lack of compliance with treatment plans and the department's service plans; the father's complacency in the chaotic and unstable home environment created in part by the parents' volatile and dysfunctional relationship; and, most prominently, the continuation of the father's relationship with the mother, over the well-being of the

children, and his inability to permanently separate himself from that relationship for the sake of the children. "These patterns of behavior would place [the children] 'at serious risk of peril' from neglect by father were [they] returned to his custody." Adoption of Cadence, 81 Mass. App. Ct. at 168, quoting Care & Protection of Bruce, 44 Mass. App. Ct. at 761.

Next, the judge made individual factual findings regarding the father's unfitness based on all the evidence presented. There was no evidence that the father asked the department for additional services to hone his parenting skills or for more time to understand the children's special needs. In addition, the father failed to file any pretrial motions in limine seeking to exclude department records or reports, or to limit those reports by redaction to include only statements of fact. See Care & Protection of Zita, 455 Mass. 272, 280 (2009). We are satisfied, based on this record, that the judge did not use the § 51A reports or other department reports for anything other than the purpose for which they were admitted -- "to set the stage" and for primary facts. "[T]he judge's findings do not intimate that [s]he used them for anything more." Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990).

Finally, the judge did not prematurely terminate the father's parental rights. In the summer of 2017, the father had separated from the mother and was living in his car. By the end

of that summer, the father had resumed his relationship with the mother and was living with her in the family home even though they were facing eviction due to foreclosure. "[I]t is proper for a judge to consider a parent's living arrangements at the time of trial despite the fact that the child[ren] w[ere] not living with [him] at that time." Adoption of Virgil, 93 Mass. App. Ct. 298, 303 (2018). The evidence also showed that the father had participated in certain services in compliance with his service plans, and learned strategic skills for communicating with his special needs children, but then did not apply those skills and unilaterally decided that the services were no longer necessary. It is true that the father adequately cared for the children when he was awarded sole custody in April 2015, but he admitted he was unable to handle all three children for an extended period. By October 2015 he had moved with the mother and the children back into the family home in violation of a court order. Soon after he fled the State with the mother and the children without notifying the department or the court. The judge was not required to "wait for disaster to happen but may rely upon past patterns of parental neglect or misconduct in determining current or future fitness." Id. at 301.

In addition, the finding that the children were thriving in their foster home, in conjunction with the determination that the children's educational, medical, and emotional needs were

being met in that home, was grounded in the evidence. As the judge concluded, the children had made great strides in overcoming developmental and educational delays exacerbated by the parents' neglect. See Adoption of Terrence, 57 Mass. App. Ct. at 835. Based on the foregoing, we see no error in the judge's finding of the father's unfitness and the termination of his parental rights to the children.

3. Posttermination and postadoption visitation. Both the mother and the father argue that the judge abused her discretion in ordering only one yearly visit between them and the children. The mother and the father also argue it was error to leave sibling visitation to the sole discretion of the department or the adoptive parents. These arguments are without merit.

The judge did not err in ordering one posttermination or postadoption visit per year between the parents and the children. "[T]he decision whether to grant postadoption visits must be left to the sound discretion of the trial judge."

Adoption of John, 53 Mass. App. Ct. 431, 439 (2001). The decision is grounded in an analysis of what is in the best interests of the children, which is precisely the analysis conducted by the judge here. See Adoption of Ilona, 459 Mass. at 63. It was proper to leave the decision to the adoptive parents as to whether the visits are in the children's best interests, as adoptive parents "are entitled to the same

presumption [as biological parents that] they will act in the best interest[s] of the child[ren] in making decisions regarding the child[ren], including decisions about visitation." Id. at 64.

We therefore see no grounds on which to upend the judge's conclusion that it is in the children's best interests to have one annual posttermination and postadoption visit with the parents. See Adoption of Cadence, 81 Mass. App. Ct. at 169. There was no abuse of discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Relying on the same rationale, we likewise find proper the order regarding sibling visitation.

Decrees affirmed.

By the Court (Rubin,
Desmond & Ditzkoff, JJ.¹¹),



Clerk

Entered: June 20, 2019.

¹¹ The panelists are listed in order of seniority.